

Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
 Washington, D.C. 20554

In the Matter of	)	
	)	
<b>INDIANA COMMUNITY RADIO CORP.</b>	)	Facility ID No. 121860
	)	File No. BNPED-19991117ABJ
<b>and</b>	)	
	)	
<b>PENNYRILE CHRISTIAN COMMUNITY, INC.</b>	)	Facility ID No. 92339
	)	File No. BPED-19981211MA
Application for a Construction Permit for a New	)	
Noncommercial Educational FM Station at	)	MX Group No. 981212
Madisonville, Kentucky	)	

**MEMORANDUM OPINION AND ORDER**

**Adopted: July 14, 2008**

**Released: July 15, 2008**

By the Chief, Audio Division, Media Bureau:

1. We have before us: (1) the above-referenced application, filed by Indiana Community Radio Corporation (“ICR”) for a new, noncommercial educational (“NCE”) FM station in Madisonville, Kentucky; (2) the above-referenced application, filed by Pennyrile Christian Community, Inc. (“Pennyrile”) for a new NCE FM station in Madisonville, Kentucky; and (3) a Petition to Deny ICR’s application (“Petition”), filed by Sound Broadcasters, Inc. (“Sound”).<sup>1</sup> The ICR and Pennyrile applications were mutually exclusive and were designated as NCE MX Group 981212. In its Petition, Sound contests the Commission’s tentative decision to grant ICR’s application, as proposed in the Commission’s March 27, 2007, *Comparative Consideration Order*.<sup>2</sup> For the reasons set forth below, we grant in part Sound’s Petition, dismiss ICR’s application, and grant Pennyrile’s application, subject to the conditions set forth below.

<sup>1</sup> Sound timely filed its Petition on May 2, 2007. In response to the Petition, ICR filed a “Motion to Strike Petition to Deny” on May 21, 2007 (“Motion to Strike”), and Sound filed a motion for extension of time to reply and a reply (“Reply”) on June 1, 2007, and June 11, 2007, respectively. Sound’s motion for extension of time is granted. On July 16, 2007, ICR submitted the following pleadings: (1) “Objection to Motion for Extension of Time (Improper)”; (2) “Motion to Strike Petition to Deny (Supplement)” (“Supplement”); (3) “Motion to Strike Petition to Deny (Supplement 2)” (“Supplement 2”); and (4) “Motion to Enlarge.” We find that the briefs filed by ICR in July were untimely filed outside the pleading cycle permitted by the Commission’s Rules. See 47 C.F.R. § 1.45. However, in the interest of a full and complete record in this proceeding, we will consider the arguments set forth in these filings.

<sup>2</sup> See *Comparative Consideration of 76 Groups of Mutually Exclusive Applications for Permits to Construct New or Modified Noncommercial Educational FM Stations*, Memorandum Opinion and Order, 22 FCC Rcd 6101 (2007) (“*Comparative Consideration Order*”).

## I. BACKGROUND

2. In the *Comparative Consideration Order*,<sup>3</sup> the Commission applied NCE comparative selection criteria<sup>4</sup> to seventy-six groups of mutually exclusive NCE FM applications and tentatively selected one winner in each group. Any party that wished to challenge a tentative selectee's application could file a petition to deny within 30 days of the issuance of a public notice announcing the tentative selectee.<sup>5</sup>

3. In Group 981212, the Commission tentatively selected ICR's application for grant because ICR had received a greater number of points than the sole competing applicant, Pennyrite, based on its superior technical proposal.<sup>6</sup> Sound asserts that the tower site listed in ICR's application is currently owned and utilized by Sound for operation of its station WFMW(FM), Madisonville, Kentucky ("Site").<sup>7</sup> Sound claims that "at no time prior to filing or in the more than seven years that [ICR's] application has been pending did ICR contact Sound or obtain consent from Sound to use the [Site]." <sup>8</sup> Sound further claims that it would "not now be willing to enter into such an arrangement" given ICR's "lack of candor concerning its intentions."<sup>9</sup> Thus, argues Sound, the specifications provided in ICR's application "should be considered void and thus, its preference under the point system vitiated."<sup>10</sup>

4. In response, ICR contends that it did, indeed, have reasonable site assurance.<sup>11</sup> ICR asserts that it "had reasonable assurance of site availability when the application was filed and since" and that "Sound ... refuses to honor a previous Lease agreement."<sup>12</sup> ICR contends that Sound's current refusal to negotiate the Site is a circumstance beyond ICR's control.<sup>13</sup> Accordingly, it requests the

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<sup>3</sup> *Id.*

<sup>4</sup> See 47 C.F.R. §§ 73.7000 – 05.

<sup>5</sup> See 47 C.F.R. § 73.7004; *Comparative Consideration Order*, 22 FCC Rcd at 6161 ¶ 202.

<sup>6</sup> See *Comparative Consideration Order*, 22 FCC Rcd at 6154 ¶ 174. See also FCC File No. BPED-19981211MA.

<sup>7</sup> Petition to Deny at 2.

<sup>8</sup> See *id.* See also Affidavit of Robert Kelley, President of Sound Broadcasters, Inc. ("Kelley Affidavit").

<sup>9</sup> See Petition to Deny at 3.

<sup>10</sup> *Id.* Sound also argues that: (1) ICR made material misrepresentations to the Commission by specifying the Site in its application, and (2) ICR's amendments to its application should be dismissed because they are technically flawed and violate numerous Rules. See *id.*; Reply at 5-7. Because we dismiss ICR's application as fatally defective for the reasons described herein, we do not reach the merits of these arguments.

<sup>11</sup> See Supplement at 1. ICR also contends that the Petition was not properly served and should, therefore, be dismissed. See Motion to Strike at 1. We note, however, that the Petition contains a Certificate of Service that indicates that ICR was, in fact, served at the address listed in ICR's application.

<sup>12</sup> See May 23, 2007, Amendment to FCC File No. BNPED 19991117ABJ. See also Supplement at 3.

<sup>13</sup> ICR also contends that Sound's alleged refusal to negotiate the tower site violates Section 73.239 of the Rules. See Supplement at 3. This Rule, known as the "unique site rule," generally states that no license may be granted to an FM broadcaster who controls a tower site "peculiarly suitable" to FM broadcasting and who restricts access to that site in a manner that limits the number of FM stations in the area or unduly restricts competition. See *Duchossois Communications Co. of California*, Memorandum Opinion and Order, 10 FCC Rcd 8072 (1995). However, ICR fails to provide any specific allegations of fact sufficient to show that Sound has violated this or any other Rule. Accordingly, we will not address this allegation further.

Commission to allow ICR to amend its application to another location and channel, and to treat such an amendment as a minor modification.<sup>14</sup>

## II. DISCUSSION

5. An applicant seeking a new broadcast facility must, in good faith, possess “reasonable assurance” of a transmitter site at the time it files its application.<sup>15</sup> It is well established that the specification of a transmitter site in an application is an implied representation that the applicant has obtained reasonable assurance that the site will be available.<sup>16</sup> While some latitude is afforded such “reasonable assurance,” there must be, at a minimum, a “meeting of the minds resulting in some firm understanding as to the site’s availability.”<sup>17</sup> A mere possibility that the site will be available is not sufficient.<sup>18</sup>

6. The Commission does not require (and has never required) NCE broadcast applicants to certify the availability of the transmitter site in its application procedures.<sup>19</sup> Nonetheless, when an NCE applicant proposes a site, it must do so with reasonable assurance in good faith that the site will be available.<sup>20</sup>

7. While there is a conflict in the affidavits provided by Sound and ICR regarding whether ICR had Sound’s permission to use the Site, the “mere existence of conflicts in affidavits does not require a hearing.”<sup>21</sup> Sound has declared unequivocally through its pleadings that it was never contacted by any

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<sup>14</sup> See Supplement 2 at 3. On May 23, 2007, and May 30, 2007, ICR filed amendments to its application proposing to: (1) change the community of license from Madisonville, KY to Drakesboro, KY; (2) change from reserved channel 219A to non-reserved channel 280A; and (3) change the transmitter site and other technical parameters. See May 23, 2007, and May 30, 2007, Amendments to FCC File No. BNPED 19991117ABJ. In order to accomplish the modification, ICR proposes modification of Station WNTC(FM), Channel 280A, Drakesboro, KY, to change community of license to Pembroke, KY, on Channel 268A. These amendments were returned on November 26, 2007, because the proposals therein constituted major changes. See *Letter to Nashville’s Sportsradio, Inc. from Susan N. Crawford*, Ref. 1800B3-SNC (MB Nov. 26, 2007).

<sup>15</sup> See, e.g., *Port Huron Family Radio, Inc.*, Decision, 66 RR 2d 545 (1989); *Radio Delaware, Inc.*, Memorandum Opinion and Order, 67 RR 2d 358 (1989).

<sup>16</sup> See, e.g., *William F. Wallace and Anne K. Wallace*, Memorandum Opinion and Order, 49 FCC 2d 1424, 1427 (1974) (“*Wallace*”); *South Florida Broadcasting Co.*, Memorandum Opinion and Order, 99 FCC 2d 840, 842 (1984).

<sup>17</sup> *Genesee Communications, Inc.*, Memorandum Opinion and Order, 3 FCC Rcd 3595 (1988). The applicant need not own the proposed site and may even work out the final details for a lease sometime in the future. The “reasonable assurance” standard is satisfied by “[s]ome clear indication from the landowner that he is amenable to entering into a future arrangement with the applicant for use of the property as its transmitter site, on terms to be negotiated....” *Elijah Broadcasting Corp.*, Memorandum Opinion and Order, 5 FCC Rcd 5350, 5351 (1990).

<sup>18</sup> See *Wallace*, 49 FCC 2d at 1425.

<sup>19</sup> See, e.g., *Carnegie-Mellon Student Government Corp.*, Hearing Designation Order, 7 FCC Rcd 3914 (MB 1992).

<sup>20</sup> See, e.g., *Midland Educational Broadcasting Foundation*, Hearing Designation Order, 4 FCC Rcd 5207 (MB 1989) (holding that applicant for noncommercial educational FM station had reasonable assurance of site availability because it paid for a lease option on transmitter site). Cf. *Alabama Citizens for Responsive Public Television, Inc.*, Memorandum Opinion and Order, 62 FCC 2d 755 (Rev. Bd. 1977) (noncommercial educational television broadcast application designated for hearing on issue of whether applicant had reasonable assurance of the site proposed in its application).

<sup>21</sup> *K.O. Communications, Inc.*, Memorandum Opinion and Order, 13 FCC Rcd 12765, 12777-78 (WTB 1998) (citing *Broadcast Enterprises, Inc. v. FCC*, 390 F.2d 493, 495 (D.C. Cir. 1968)).

representatives of ICR to discuss ICR's use of the Site, and that it never authorized ICR to utilize the site.<sup>22</sup> Conversely, while ICR has declared that it did have reasonable assurance to use the Site, it has failed to provide any specific allegations of fact that support this claim. For example, ICR does not provide the names of the representatives at Sound with whom it allegedly negotiated, nor does it describe the nature of the negotiations, or the date, time or location at which such negotiations allegedly occurred. Moreover, while ICR claims to have entered into a lease agreement for use of the Site, it has failed to provide us with the copy of the agreement.<sup>23</sup> Although the "reasonable assurance" standard is a liberal one, ICR has provided no basis for us to conclude it ever had such assurance.

8. In response to Sound's site assurance allegations, ICR amended its application to specify a different site.<sup>24</sup> The Commission, however, has repeatedly held that "an applicant will not be permitted to amend where it did not have the requisite reasonable assurance to begin with..."<sup>25</sup> Accordingly, because there is no evidence that ICR ever secured reasonable assurance for its proposed site, it is not permitted to amend to cure this fatal defect.<sup>26</sup> We thus rescind our tentative decision to grant ICR's application for a permit to construct a new NCE FM station, as proposed in the *Comparative Consideration Order*,<sup>27</sup> and dismiss ICR's application.

9. *Pennyrile Application.* With the dismissal of ICR's application, Pennyrile is the sole remaining applicant. Pennyrile's application was accepted for filing by a public notice pursuant to an "A" cutoff list on November 17, 1999, the petition to deny period triggered by that notice has run, and Pennyrile, as a "singleton," is not subject to point system findings that might be challenged in a further petition to deny.<sup>28</sup> We have evaluated Pennyrile's application and find that it complies with all pertinent statutory and regulatory requirements. Moreover, we have evaluated Pennyrile's application pursuant to Section 309(a) of the Communications Act of 1934, as amended, and find that grant of the application would serve the public interest, convenience, and necessity.<sup>29</sup> Therefore, we will grant Pennyrile's application.

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<sup>22</sup> See Petition, Kelley Affidavit.

<sup>23</sup> See *K.O. Communications, Inc.*, 13 FCC Rcd at 12778.

<sup>24</sup> See n.14, *supra*. Even if we had considered the amendments, we note that ICR did not provide a grantable proposal because it proposed to switch to Channel 280A, which is a non-reserved channel.

<sup>25</sup> See *Classic Vision, Inc.*, Memorandum Opinion and Order, 104 FCC 2d 1271, 1273 (1986), *review denied*, 2 FCC Rcd 2376 (1987); see also *REM Malloy Broadcasting*, Memorandum Opinion and Order, 6 FCC Rcd 5843 (1991); *Family Broadcasting, Inc.*, Initial Decision, 10 FCC Rcd 3174 (1995).

<sup>26</sup> See, e.g., *62 Broadcasting, Inc.*, Memorandum Opinion and Order, 4 FCC Rcd 1768 (1989) (applicant which knew it did not have reasonable assurance of the transmitter site at the time it filed its application could not cure fatal defect by amending to specify a new site). Conversely, where there is evidence that an applicant has proceeded in good faith, we have permitted curative amendments. See *Great Lakes Broadcasting, Inc.*, Memorandum Opinion and Order, 6 FCC Rcd 4331 (1991) (applicant permitted to amend to a new site where it reasonably believed it had assurance of the proposed site when it certified).

<sup>27</sup> See n.2, *supra*.

<sup>28</sup> See, e.g., *Comparative Consideration Order*, 22 FCC Rcd at 6128 ¶ 69 (dismissing defective application and granting sole remaining application in MX group 950215).

<sup>29</sup> See 47 U.S.C. § 309(a).

### III. CONCLUSIONS/ACTIONS

10. Accordingly, IT IS ORDERED, that the motion for extension of time to reply filed on June 1, 2007, by Sound Broadcasters, Inc. IS GRANTED.

11. IT IS FURTHER ORDERED, that the Petition to Deny filed on May 2, 2007, by Sound Broadcasters, Inc. IS GRANTED to the extent indicated herein and IS DENIED in all other respects.

12. IT IS FURTHER ORDERED, that the tentative selection of the application of Indiana Community Radio Corp. (File No. BNPED-19991117ABJ) for a permit to construct a new NCE FM station, as proposed in the *Comparative Consideration Order*,<sup>30</sup> IS RESCINDED.

13. IT IS FURTHER ORDERED, that the application of Pennyrite Christian Community, Inc. (File No. BPED-19981211MA) IS GRANTED CONDITIONED UPON its compliance with Section 73.7005 of the Commission's Rules, 47 C.F.R. § 73.7005, which sets forth a four-year holding period for applicants that are awarded permits by use of a point system.

14. IT IS FURTHER ORDERED, that the mutually exclusive application of Indiana Community Radio Corp. (File No. BNPED-19991117ABJ) IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Peter H. Doyle  
Chief, Audio Division  
Media Bureau

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<sup>30</sup> See n.2, *supra*.